

STATE OF MICHIGAN
COURT OF APPEALS

OLIVER MATHES III,

Plaintiff-Appellant,

v

OAKLAND COUNTY,

Defendant-Appellee.

UNPUBLISHED

March 17, 2011

No. 294513

Oakland Circuit Court

LC No. 2008-095417-NO

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals the trial court's grant of summary disposition to defendant. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

After retiring from the Pontiac Police Department, plaintiff, an African-American male, was hired as an investigator with the Oakland County Prosecutor's Office in December 2000. Plaintiff worked in the Family Support Unit where he located, investigated, and interviewed people who owed support to minors. Until 2006, two other investigators worked in the Family Support Unit and other investigators worked in the Economic Recovery Unit, the Domestic Violence Unit, and the Child Sexual Assault Unit.

In 2006, because of budget constraints and understaffing in the juvenile division, the prosecutor's office implemented a personnel reorganization. Plaintiff's position in the Family Support Unit was eliminated and, despite plaintiff's seniority, Terry Healy, who is white, was retained as the investigator in the Child Sexual Assault Unit based on his superior qualifications and training. After plaintiff's union representative demanded special conferences to discuss why Healy was retained despite plaintiff's seniority, plaintiff agreed to be reassigned to a newly created position, Court Service Officer II, rather than lose his employment or submit the matter to binding arbitration.

Plaintiff began working as a court service officer on June 3, 2006, but resigned on May 15, 2007, citing health problems and dissatisfaction with the job. Thereafter, he filed a complaint with the Michigan Department of Civil Rights (MDCR) and claimed that his reassignment to the court service officer position constituted an adverse employment action that

was racially motivated. At plaintiff's request, the MDCR dismissed the complaint and plaintiff filed this action alleging race discrimination on October 20, 2008.

Defendant filed a motion for summary disposition on July 6, 2009, pursuant to MCR 2.116(C)(10). Specifically, defendant argued that plaintiff cannot show that the decision to eliminate his position but retain Healy was based on race. Defendant further argued that defendant had a legitimate basis for its decision to retain Healy in the Child Sexual Assault Unit, specifically citing Healy's qualifications and experience as the reason it did not allow plaintiff to "bump" Healy out of his position. Defendant noted that, during his deposition, plaintiff admitted that he never investigated a child sexual assault case or received training on topics related to child sexual abuse. Defendant also presented the testimony of the decision makers who testified that an investigator in the Child Sexual Assault Unit must have experience working with Care House, an advocacy center for abused and neglected children in Oakland County, knowledge and experience in conducting interviews with child victims, child victim advocacy experience, and experience testifying in court in child sexual abuse cases. Defendant submitted the affidavit of Chief Deputy Prosecutor Deborah Carley, who stated that, based on his lack of experience, plaintiff would not be able to perform the job of a child sexual assault investigator immediately or in the near future.

In response, plaintiff argued that his reassignment was an adverse employment action and that defendant characterized the position in the Child Sexual Assault Unit as "specialized" in order to justify plaintiff's demotion. Plaintiff maintained that the position of investigator in the Child Sexual Assault Unit required no more than general police skills and he presented the written deposition answers of his union representative, Kermit Peters, who stated that plaintiff was qualified to perform the job. Plaintiff also submitted the affidavit of an investigator in the Family Support Unit who stated that any one of the investigators could have done the job in the Child Sexual Assault Unit if they received additional training. Plaintiff also argued that defendant evidenced a discriminatory animus by forcing him to re-interview for his investigator position before his demotion, requiring him to submit documents already in defendant's possession, by "arbitrarily" deeming Healy more qualified than plaintiff, and by offering more training opportunities to Healy. Plaintiff further argued that he should have been retained in the Family Support Unit instead of another investigator with more seniority, Dominique Tamburrini, because, unlike Tamburrini, he was certified by the Michigan Commission on Law Enforcement Standards (MCOLES).

The trial court issued an opinion and order granting summary disposition to defendant on September 22, 2009. The court ruled that plaintiff failed to establish a genuine issue of fact that he was qualified for the position of child sexual abuse investigator, which required specialized training and experience. The court further held the plaintiff failed to show that his MCOLES certification made him more qualified than Tamburrini to work in the Family Support Unit. The court also rejected plaintiff's claim of racial animus based on the requirement that he re-interview for his investigator position and submit documentation because plaintiff did not submit evidence to support this assertion or to show that other employees were treated differently.

II. ANALYSIS

A. STANDARD OF REVIEW AND APPLICABLE LAW

Plaintiff argues that the trial court erred by granting summary disposition to defendant on his claim of racial discrimination. As this Court explained in *Campbell v Human Services Dep't*, 286 Mich App 230, 234-235; 780 NW2d 586 (2009):

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Summary disposition of all or part of a claim may be granted under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (citation and quotation marks omitted). The moving party must specifically identify the matters that allegedly have no disputed factual issues, and the nonmoving party must support its position that a disputed factual issue does exist by using affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006).

Plaintiff contends that defendant violated Section 202 of the Civil Rights Act, MCL 37.2101 *et seq.* which provides:

(1) An employer shall not do any of the following:

(A) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202.]

According to plaintiff, he established a prima facie case of discrimination under a mixed motive theory and based on circumstantial evidence. As our Supreme Court explained in *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 133-134; 666 NW2d 186 (2003):

In a direct evidence case involving mixed motives, i.e., where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a "substantial" or "motivating" factor in the decision. In addition, a plaintiff must establish her qualification or other eligibility for the position sought and present direct proof that the discriminatory animus was causally related to the adverse decision. Stated another way, a defendant may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision.

In cases involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 LEd2d 668 (1973). This approach allows "a plaintiff to present a rebuttable prima facie case on the basis of proofs

from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination.” [*DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538; 620 NW2d 836 (2001)]. To establish a rebuttable prima facie case of discrimination, a plaintiff must present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) her failure to obtain the position occurred under circumstances giving rise to an inference of unlawful discrimination. Once a plaintiff has presented a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination. [Some citations omitted.]

B. THE TRIAL COURT CORRECTLY GRANTED SUMMARY DISPOSITION TO DEFENDANT

Plaintiff contends that the trial court erroneously made findings of fact in deciding the motion for summary disposition that should have been decided by the jury. Plaintiff is correct that “[a] court may not make findings of fact when deciding a summary disposition motion.” *Price v Kroger Co of Michigan*, 284 Mich App 496, 500; 773 NW2d 739 (2009). However, contrary to plaintiff’s assertion, the trial court did not make factual findings, but ruled that plaintiff failed to present evidence to establish an issue of fact that he was qualified for the position of investigator in the Child Sexual Assault Unit.

Defendant submitted the deposition testimony of Chief Deputy Prosecuting Attorney Deborah Carley who stated that, in the event of personnel cuts, the prosecutor’s office follows the collective bargaining agreement and considers an employee’s seniority as well as his or her ability to perform the remaining work, which requires a consideration of whether the employee can perform the job immediately or within the near future. She further testified that the position of investigator in the Child Sexual Assault Unit requires forensic interview training and certification, a working relationship with Care House, knowledge of how to conduct interviews of child victims of sexual assault, an ability to make charging decisions in sexual assault cases, victim advocacy experience, knowledge of all aspects of conducting a child sexual assault investigation, and experience testifying in court in child sexual assault cases.

Defendant presented evidence that, when Carley and Mary Larkin, Chief Attorney - Administration, asked both plaintiff and Healy to outline their experience and qualifications for the position of investigator for the Child Sexual Assault Unit, Healy submitted an extensive list of his training and qualifications. Healy had worked in the Child Sexual Assault Unit for three years, he previously worked as a victims advocate in the Victim’s Services Section and, as a detective sergeant in the Pontiac Police Department, he was assigned to the sexual assault/child abuse section when he “investigated hundreds of child sexual assaults” and assisted in their prosecution. Healy was the law enforcement representative for the Care House case review committee, he received certification as a forensic interviewer for children, and he had conducted hundreds of investigations and interviews with child abuse victims. Healy also reported that he completed training in, among other subjects, human trafficking, family violence, child abuse

investigation, detection of child sexual exploitation and advanced sex crimes investigation. In contrast, plaintiff submitted a brief summary of his experiences:

P.A.L. Director for youth baseball, basketball, football, work with children to help them grow up and be successful adults. One of the kids in the program is current Chief of Police for city of Pontiac Valard Gross. As detective with the Pontiac Police I was assigned major crimes cases. I investigated gang activity in Pontiac, children in the ages from youth 13 yrs up to 17 yrs, involving assaults and gang activity. Worked with the juvenile section, and youth officers investigating serious crimes. [A]ttended and competed [sic—completed] Homicide School and trained in crime scene investigations. Work[ed] hundreds of assaults cases with juvenile victims as well as juvenile offenders.

Plaintiff failed to respond when asked for timeframes for his relevant experiences and, as noted, he conceded at his deposition that he had never investigated a child sexual assault case as a police officer and he never received any special training in any areas related to child sexual assaults. Prosecutor David Gorcyca also stated in his affidavit that plaintiff simply did not have the experience or qualifications to be the investigator in the Child Sexual Assault Unit. To put it succinctly, Healy had overwhelmingly superior qualifications compared to plaintiff and plaintiff had no experience in this highly specialized area.

In response to defendant's motion, plaintiff submitted written statements from two investigators who worked in the Family Support Unit, who asserted that plaintiff or any of the other investigators were qualified to be an investigator in the Child Sexual Assault Unit. However, neither of the investigators offering this evidence had any decision-making authority or any role in comparing the relative qualifications of plaintiff and Healy, and neither had experience working in the Child Sexual Assault Unit. Based on the evidence submitted, plaintiff failed to establish a genuine issue of material fact to show that plaintiff was, indeed, qualified for the position in the Child Sexual Assault Unit. Rather, the evidence showed that the position required specialized experience and training that plaintiff simply lacked and that he would not be able to perform the job immediately or in the near future.

Plaintiff also contends that the trial court erred when it ruled that plaintiff failed to show he was more qualified than another, more senior, white employee, Dominic Tamburrini, because plaintiff is MCOLES certified and Tamburrini is not. Plaintiff presented no further evidence with regard to the relative experience or qualifications of Tamburrini. Moreover, as the trial court correctly ruled, plaintiff failed to present evidence or arguments to show that MCOLES certification was necessary or beneficial to perform the job of investigator in the Family Support Unit or how this certification in any way made him more qualified than Tamburrini to perform that job.

C. ALLEGED ADMISSION BY DEFENDANT

Plaintiff asserts that the trial court erred by failing to consider his argument that defendant admitted there are issues of fact to be decided by a jury. In response to defendant's motion for summary disposition, plaintiff argued that, in a motion in limine to exclude a draft

report from the MDCR or witnesses from the MDCR, defendant asserted there is a disputed issue of fact about whether plaintiff was treated differently than other employees.

When the motion was filed, the motion for summary disposition was pending in the trial court. The motion in limine was submitted to prevent certain evidence from being introduced at trial with the assumption that all disputed issues would be presented to the jury. The motion in limine could not assume that the motion for summary disposition would be granted in whole or in part and, thus, defendant presented an argument that the jury must decide issues in dispute without evidence that might unfairly usurp the jury's role. We reject plaintiff's assertion that defendant made a binding admission; defendant simply made a legal argument in the event that all issues raised by the plaintiff would be presented to the jury at trial.

Moreover, contrary to plaintiff's position, defendant's argument in the motion in limine does not constitute a "judicial admission," which is defined as "a statement made by a party or his counsel, in the course of trial . . . [that] is a distinct, formal, solemn admission made for the express purpose of, *inter alia*, dispensing with the formal proof of some fact at trial." *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969). Defense counsel's assertions in the motion in limine are not admissions of fact, but are merely legal arguments related to the admissibility of specific evidence. Moreover, the statements were not made at trial and can in no way be considered "distinct, formal, solemn" concessions of fact. Plaintiff's argument is wholly without merit.

D. MDCR REPORT

Plaintiff argues that the trial court erred when it failed to address in its opinion and order a report purportedly drafted by an MDCR investigator, Tracey Buchanan Brown. Though plaintiff claims that the investigative report falls within the business records exception to the hearsay rule, MRE 803(6), plaintiff failed to lay a proper foundation for the admission of the document and plaintiff ignores that Brown's opinions and conclusions are based on numerous other documents and statements that may or may not fall within a hearsay exception. To admit a document containing hearsay statements or conclusions based on hearsay evidence, the party must establish that such statements or documents are also admissible. *Morrow v Bofferding*, 458 Mich 617, 629; 581 NW2d 696 (1998). Plaintiff failed to make this showing. Further, even if Brown drafted investigation reports in the regular course of business, elements of the document lack the inherent trustworthiness of business records when the subject matter is inherently adversarial. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Accordingly, plaintiff's argument that the trial court should have relied on the investigative report is unavailing.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering